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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 95-051

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

2. Form, Style and Placement in Administrative Code

a. Section ERB 4.02 (7) and (8) should be reversed to preserve alphabetical order in this section.

b. In s. ERB 4.04, the correct method of cross-referencing other provisions in ch. ERB 4 is: “ss. ERB 4.06, 4.07 and 4.08.”

4. Adequacy of References to Related Statutes, Rules and Forms

a. The rule makes a number of references to terms and actions defined or described in 49 U.S.C. Appendix 1802 and 1805. However, those sections were repealed in 1994 and recreated elsewhere in Title 49 of the U.S. Code. Accordingly, correct federal citations should be used in the rule.

b. The fiscal estimate to the rule notes that a court challenge to the current registration fee structure necessitates, in part, the recreation of the fees. What court case was this? An appropriate citation and discussion of that case should be contained in the analysis of the rule.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The definition of the term “activity” in s. ERB 4.02 (1), is very confusing. For purposes of the rule, is an activity simply the offering or transporting of hazardous materials? If so,

s. ERB 4.03 would provide that certain activities described in the section would be the basis for calculating the fee.

b. Why is the phrase “doing business in Wisconsin” defined, in part, as a person in s. ERB 4.02 (3)? In light of comment a, above, can the phrase be redefined as describing an activity within or through the State of Wisconsin?

c. In s. ERB 4.02 (5), does an “offeror function” include a “transporter function” as defined in s. ERB 4.02 (11)? The word “by” in the first sentence should be replaced by the phrase “and includes.” The references to the U.S. and Wisconsin hazardous material registration programs should contain appropriate cross-references to assist the reader in understanding which programs are referred to. The last phrase of the first sentence makes providing placards to carriers an offeror function. It is assumed that those placards must be some sort of hazardous materials placards. However, the rule should be clarified to more fully express the rule’s intent. The last sentence of s. ERB 4.02 (5) is a substantive provision and, accordingly, should be removed from the definition [s. 1.01 (7) (b), Manual].

d. In s. ERB 4.02 (11), the definition of a “transporter function” appears to be very broad. Should the phrase “of property” be replaced by the phrase “of hazardous material”?

e. Section ERB 4.03 (1) would be made more clear if it were rewritten substantially as follows: “Any person doing business in Wisconsin who is required to file hazardous materials transportation registration statements with the United States department of transportation under 49 USC _____ and who participates in one of the following activities during the registration year shall file a hazardous materials transportation registration application with the department.”. The underlined sentence preceding par. (b) could then be deleted. The final sentence of sub. (1) could then be removed to a provision of the rule relating to the calculation of the fee. In addition, for purposes of pars. (a) to (e), the terms “offer” and “transport” are used. Although the terms are related to “offeror function” and “transporter function,” an attempt should be made to use the defined terms. In the alternative, perhaps it would be best to define these terms rather than the terms “transporter function” and “offeror function.” Also, it appears that the word “defined” should be inserted before the word “under” in pars. (b) and (c). Finally, what “registration” regulations are referred to in par. (e)? An appropriate cross-reference should be included.

f. The word “shall” in the first sentence of s. ERB 4.03 (2) and (3) should be replaced by the word “may” [s. 1.01 (2), Manual]. It is not clear from the rule whether there are separate certificates of registration for transporters and offerors. If there is only one certificate of registration that is issued to both, it would appear that subs. (2) and (3) could be combined to provide the following: “No person doing business in Wisconsin may engage in an activity under sub. (1) without first obtaining a certificate of registration from the department.” The rule could then specify that transporters must carry their certificates and offerors must keep their certificates in their principal places of business. If there are two different certificates, the rule should be clarified accordingly.

g. In s. ERB 4.03 (2), what is an “appropriate transport vehicle”?

h. In s. ERB 4.03 (4), which persons are required to maintain records and source documents? When does the three-year period commence? Is the audit referred to in the second

sentence an audit under sub. (5)? If so, an appropriate cross-reference should be included. If not, what audit is it? Also, a cross-reference to the “statute of limitations for assessment of additional penalties” should be provided. What does the third sentence mean? Is the “record retention period” mentioned in the final sentence the three-year period referred to in the first sentence? The rule should be clarified accordingly.

i. In s. ERB 4.03 (5), which persons doing business in Wisconsin may the department audit? It appears that the phrase “upon request” should be inserted after the word “department” in the third sentence.

j. Section ERB 4.04 is difficult to understand. It appears that the section contemplates the payment of one fee but that the determination of that fee depends upon the sum of three separate fees, namely the activity fee, the mileage fee and the volume fee. The clarity of the rule might be enhanced if the section were rewritten substantially as follows:

(1) Except as provided under ss. ERB 4.06, 4.07 and 4.08, any person doing business in Wisconsin during the registration year as a transporter of hazardous material who is required to file hazardous materials transportation registration statements with the United States department of transportation under 49 USC ____ shall pay a transporter fee to the department. The transporter fee shall be determined by adding the activity fee determined under sub. (2), the mileage fee determined under sub. (3) and the volume fee determined under sub. (4). The transporter fee shall be paid annually on or before January 1.

Subsection (2) could then provide for the determination of the activity fee, sub. (3) could provide for the determination of the mileage fee and sub. (4) could provide for the determination of the volume fee. The fee calculations provided in current sub. (3) could then be placed in the appropriate subsections.

If the above suggestions are not followed, sub. (3) should, at a minimum, be rewritten to comply with appropriate numbering rules identified in s. 1.03, Manual. Finally, the use of the phrase “as in” should be replaced by appropriate phrases such as “as described in” or “as specified” or replaced by the word “under.”

k. In s. ERB 4.05 (1), the second sentence could be deleted since the calculation of the fee appears to be adequately covered under sub. (2).

l. In s. ERB 4.05 (2) (a) and (b), the word “within” should be replaced by the word “under.” Also, it is not clear how the supplemental high-risk fee is to be calculated. Is this fee in addition to the other fees? Must the person who has to pay the supplemental high-risk fee be engaged in all of the activities in s. ERB 4.03 (1) (a) to (c)? The rule should be more clear.

m. Section ERB 4.06 (1) could be simplified by providing that any person required to pay a fee under s. ERB 4.04 (1) may elect to submit a consolidated fee in lieu of the fee determined under s. ERB 4.04 (1). Subsection (2) (intro.) should be simplified by incorporating par. (a). Thus, sub. (2) should read: “Except as provided under s. ERB 4.08, the consolidated fee is \$2,100.”

n. The material in s. ERB 4.07 should not be denominated as sub. (1) because it is the only material in the section. [See s. 1.03, Manual.] Also, the word “function” should be plural.

o. Section ERB 4.08 repeatedly uses the phrase “person who did not engage in business in Wisconsin.” The rule defines “doing business in Wisconsin” but not “engaging in business in Wisconsin.” Do these terms have different meanings? If so, what are the differences? If not, the defined term should be used consistently throughout the rule. In addition, the construction of s. ERB 4.08 seems incredibly circular and seems to lead nowhere. Section ERB 4.08 (1) provides that a person engaged in a transporter function who did not engage in business in Wisconsin, and who is required to register under this chapter for the entire current registration year, must pay a minimum activity fee. However, s. ERB 4.03 (1) provides that a person is required to file a registration application with the Wisconsin Department of Transportation if, among other things, the person is doing business in Wisconsin. If a transporter did not “engage in business in Wisconsin,” how can the person be required to register under s. ERB 4.03 (1) and then be required to pay a minimum activity fee under s. ERB 4.08 (1)? See also subs. (2) and (3). Are the fees in this section cumulative? Can a person pay one fee under one subsection and avoid the fees in the other subsections?

p. In s. ERB 4.08 (1), an appropriate cross-reference should be provided for the minimum activity fee, mileage fee and volume fee. The word “Furthermore” in the second sentence should be deleted. Does the second sentence apply only to transporters not doing business in Wisconsin? As written, the second sentence appears broad enough to cover all transporters engaged in the identified activities.

q. In s. ERB 4.08 (2), the word “Furthermore” should be deleted. Does the second sentence apply only to offerors not doing business in Wisconsin?

r. In s. ERB 4.08 (3) (intro.), the word “function” should be inserted after the first use of the word “transporter.”

s. The word “times” in s. ERB 4.08 (3) (a) and (b), should be replaced by the word “by.” In addition, a semicolon should be inserted after the word “or” in par. (a). Is the phrase “if applicable” necessary? It seems that it would be more appropriate to incorporate par. (a) into the (intro.), denominate the (intro.) as par. (a) and create an introductory clause in the new par. (a) reading: “Except as provided in par. (b),”. Finally, the rule should be more clear as to whom par. (b) applies. Does it apply only to persons not doing business in Wisconsin in the reporting period?

t. What program and which program registrants are referred to in s. ERB 4.09 (1) (intro.)? The standard system of numbering should be used in s. ERB 4.09. [See s. 1.03, Manual.] In sub. (1) (c), the phrase “(a) in the subsection” should be replaced by “par. (a).”

u. It does not appear that s. ERB 4.10 provides a fee exemption. Rather, it seems it provides a fee adjustment. In addition, the last sentence of that section appears to refer to forms and the submission of exemptions that are discussed nowhere else in the rule. Appropriate cross-references to the administrative or statutory citations should be provided. In addition, the term “State Emergency Response Board” should not be capitalized.

v. In s. ERB 4.11, the phrase “per day per separate offense” is somewhat unclear. The rule may be more clear if that phrase were deleted and another sentence added at the end of the section which provides that each day of continued violation constitutes a separate offense.

w. Is the rule intended to become effective on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2), (intro.), Stats. [See s. 1.02 (4), Manual.] The effective date should be clarified.